IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 174 OF 2004.

Tukaram Yashwant Patil. ... Petitioner

Versus.

S.B.Sutar and another. ... Respondents.

Shri T.S.Ingale for the Petitioner.

Shri Sandesh D.Patil for the Respondent No.1.

Shri Sameer S.Tambekar for the Respondent No.2.

Mrs.S.D.Shinde, A.P.P. for the State.

CORAM : ABHAY S. OKA, J.

DATED : 29th Sept., 2005.

P.C.:

1. Heard the learned Advocates appearing for the parties.

2. The Petitioner filed a complaint under section 138 of the Negotiable Instruments Act 1881 by impleading the Respondent No.1 herein as Accused. On 4th January 2003, on the complaint filed by the Petitioner, process was issued. An application was made by the Respondent No.1 for recall of the order issuing process. The said application was made on the ground that the cheque in question was issued by the Respondent No.2 in his capacity as proprietor of S.E.and Sons and the cheque was not issued by the Respondent No.1. On the basis of the said application, the Petitioner made an application presumably under section 319 of the Code of Criminal

Procedure, 1973 seeking permission to add the Respondent No.2 as co-accused. A contention was also raised that the Respondents Nos.1 and 2 should be charged under section 420 read with section 34 of the Indian Penal Code. By the impugned order dated 7th January 2004, the learned Judicial Magistrate First Class, Karad, rejected the said application.

3. After hearing heard the Advocates appearing for the parties, I find that there is no merit in the petition. The private complaint filed by the Petitioner is only under section 138 of the Negotiable Instruments Act, 1881. Admittedly notice as contemplated by section 138 was not issued by the Petitioner to the Respondent No.2 who is the drawer of the cheque. The notice was issued to the Respondent No.1. It is, therefore, obvious that no case of commission of offence was made out as against the Respondent No.2, and therefore, he could not have been impleaded as a co-accused. As far as the prayer made under section 216 is concerned, I find that the learned Magistrate has not committed any error. The complaint was under section 138 of the Negotiable Instruments Act which is to be tried by summary procedure. Therefore, section 216 could not have been invoked. There is no error in the view taken by the learned Magistrate. The petition is dismissed.

4. It is made clear that all contentions of the parties

on merits of the complaint as well as on the application made by the Respondent No.1 for recall of the process are kept open. The observations which are made in this order are only for the limited purpose of considering the merits of the application at Exh.18. This order will not preclude the Petitioner from adopting any other proceedings against the Respondents Nos.1 and 2 under appropriate provisions of law.

Judge.